



THE COMMONWEALTH OF MASSACHUSETTS
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September 6, 2002

Sent via e-mail, hand delivery and/or U.S. Mail

Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110

re: DTE 02-24/25, Fitchburg Gas and Electric

Dear Secretary Cottrell:

Enclosed for filing are the Attorney General's Response to the Company's September 5, 2002 motion regarding the sufficiency of its access to certain documents, and a Certificate of Service in the above-referenced proceeding.

Sincerely,

Edward G. Bohlen
Assistant Attorney General
Utilities Division
200 Portland Street, 4th Floor
Boston, MA 02114
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KJR/kr

Enc.

cc: John Geary, Hearing Officer (w/2 enc.)
DTE 02-24/25 Service list (w/enc.)

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Fitchburg Gas and Electric Light Company)	D.T.E. 02-24/25
)	
)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding by e-mail and by either hand delivery or mail.

Dated at Boston this 6th day of September 2002.

Edward G. Bohlen
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**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Fitchburg Gas and Electric Light Company)	D.T.E. 02-25
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**RESPONSE BY THE ATTORNEY GENERAL TO THE COMPANY’S SEPTEMBER 5,
2002 MOTION TO RESTRICT ACCESS TO CERTAIN 2000-2002 REPORTS AND
CROSS-MOTION TO EXCLUDE CERTAIN 2000-2002 REPORTS UNLESS FULLY
PRODUCED UNDER A GRANT OF CONFIDENTIAL TREATMENT**

The Attorney General hereby opposes that portion of the Fitchburg Gas and Electric’s (“the Company”) September 5, 2002 motion (“Motion”) which seeks to restrict access to certain third-party copyrighted wage and benefit reports (“2000-2002 Reports”), pursuant to the Hearing Officer’s schedule set during the September 4, 2002 evidentiary hearings and 220 C.M.R. § 1.06(6)(d)(1).¹

The Department should strike all references to the 2000-2002 Reports.² As grounds for this opposition and cross-motion, the Attorney General renews his arguments, stated in his August 23, 2002 oral motion and August 26, 2002 written hearing officer appeal, regarding his motion to strike portions of the Company’s response to Attorney General Record Request 7 (“AG-RR-7”), and states the following.³

¹ The Company purports to restrict access to ten volumes of wage and benefit data consisting of over 3,800 pages.

² The specific references are contained in AG-RR-7; Exh. FGE-MHC-1, pp. 37-40 (Electric) and pp. 34-37 (Gas), Bates-stamp numbers 040-043 (Electric) and 037-040 (Gas); AG-FGE-7-12 (Electric), AG-FGE-5-12(gas), Tr. 1, pp. 100-109; Tr. 11, pp. 1344-1390.

³ The Company, in its testimony and its responses to AG-FGE-7-12 (Electric) and 5-12
(continued...)

The Motion should be denied because the Company seeks a result that would be neither legal nor fair. The Company is asking the Department to allow recovery of expenses based in part on information that would not be contained in the record, which the Department legally may not do. G.L. c. 30A, § 11(4). The Company is attempting, through its Motion, to inject a huge volume of unfiled, unreproducible and unverifiable information into the Department's investigation at a very late stage, which would effectively and unfairly deprive the Attorney General of his ability to cross examine the Company's witness on testimony that relies on the 2000-2002 Reports. For these reasons, the Department should strike all references to the 2000-2002 Reports from the record.

I. BACKGROUND

On May 17, 2002, the Company filed with the Department two separate rate cases for its gas and electric divisions. As part of its case, the Company submitted the testimony of Mr. Mark Collin regarding proposed increases in its payroll operations and maintenance expenses. Exh. FGE MHC-1, pp. 37-40 (Electric) and Exh. FGE MHC-1, pp. 34-37 (Gas).⁴ The Company's proposed payroll

³(...continued)
(Gas), referred to additional copyrighted surveys and reports published by Watson Wyatt, Towers Perrin, Compdata, the American Gas Association, and the Edison Electric Institute. The Company states that it used surveys published by these companies to "benchmark" the 1998 Hay Study recommendations. On August 23, 2002, the Attorney General moved to strike all but the first two sentences from the Company's response to AG-RR-7 on the grounds that the remaining information was irrelevant, did not respond to the question asked, attempts to include information that cannot be filed as part of the record, and was provided in an untimely manner. Tr. 11, p. 1367. The Hearing Officer denied the motion without explanation (Tr. 11, p. 1368). The Attorney General appealed the ruling on August 26, 2002, and renewed his appeal regarding AG-RR-7 on September 4, 2002. Tr. 12, p. 1536-1537. That appeal is pending.

⁴ The corresponding Bates-stamp numbered pages are 040-043 (Electric) and 037-040 (Gas).

increases are based in part on a January 19, 1998 Hay Group wage and benefit study (“1998 Study”) and data collected May 1, 1997 (“1997 Reports”). Tr. 11, p. 1344-1345. Those increases are also based, according to the Company, on additional wage and benefit information from several compensation analysts (“2000-2002 Reports”). AG-FGE-7-12 (Electric) and 5-12 (Gas).

On August 28, 2002, the Company produced copies of the 1997 Reports as requested by the Attorney General. The Attorney General, in response, withdrew his appeal of the Hearing Officer’s ruling regarding production of the 1998 Study on September 4, 2002. See August 26, 2002 Appeal; Company’s August 27, 2002 Response; Tr. 12, p. 1536-1537. However, the Company: 1) refused to send copies of the 2000-2002 Reports to the Attorney General as it had agreed to do in the Nondisclosure Agreement;⁵ (2) did not file copies of the 2000-2002 Reports with the Department or the parties; and (3) did not allow the Department or the Attorney General to make copies of the documents. Instead, the Company restricted access to these documents by allowing only note-taking in the Company’s counsel’s office, with the expressed statement that the notes themselves were to be destroyed upon conclusion of the case. AG-RR-7; Motion, p. 6.

II. STANDARD OF REVIEW

All evidence upon which the Department relies for its decision must be offered and filed as part

⁵ Under the terms of the nondisclosure agreement, executed July 3, 2002, the Company agreed to send copies of allegedly proprietary information to the Attorney General’s office, not merely allow the Attorney General to view the data. The volumes of material published annually by Watson Wyatt, Towers Perrin, Compdata, AGA, and EEI have of not been produced in accordance with the nondisclosure agreement executed by the Company and the Attorney General.

of the record.⁶ Absent its production, the information must be stricken from the record and cannot be used by the Department in reaching its decision. *Id.* Parties have a right to cross examine witnesses who testify. G.L. c. 30A, § 11(3).

Relevant intellectual property, procured under a third-party licensing agreement which prevents discovery, must be produced if: (1) The information is an essential component of the Company's testimony; (2) The information is highly relevant to the proceeding; and (3) The Company's substitute method of providing the information or making certain information available to the parties does not satisfy the requirement that the relevant information be produced. (Verizon's Unbundled Network Elements, D.T.E. 01-20 (UNE) Order (August 31, 2001), pp. 13-19 ("UNE Order").

III. ARGUMENT

A. The Company's Motion Should Be Denied And All References To the 2000-2002 Reports Should Be Stricken; To Do Otherwise Would Be Neither Legal Nor Fair.

In this matter, the Company is asking the Department to allow it to recover increased employee expenses based in part on the 2000-2002 Reports. Company witness Mark Collin testified that the Company used the 2000-2002 Reports to confirm the reasonableness of the test year level of employee expenses. Company Motion at 3.

At the same time, by denying any copying of the 2000-2002 Reports, the Company refuses to provide 2000-2002 Reports as record evidence upon which the Department may rely in deciding the

⁶ "All evidence, including any records, investigation reports, and documents in the possession of the agency of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record in the proceeding, and no other factual information or evidence shall be considered G.L. c.30A, §11(4).

appropriate level of expense recovery.⁷ The Company effectively asks the Department to violate the law; the Department may not allow recovery of expenses based on evidence that is not contained in the record. G.L. c. 30A, § 11(4).

The Company also would deny the Department and the parties reasonable access to the 2000-2002 Reports to prepare for cross examination. Unlike its handling of the 1997 Reports, the Company has not delivered copies of these benchmarking documents to the Department and the Attorney General as requested. The Company's restricted access is not meaningful access which, according to the Hearing Officer's ruling, could have been production under a grant of confidential treatment. Tr. 12, p. 1523. The Company's restrictions make the information effectively unavailable and totally unreproducible, thereby failing to meet the Department's discovery standard and failing to allow parties access to the clearly relevant information. The restricted access does not satisfy the Company's obligation to support its assertions with information that can be made part of the record. UNE Order (August 31, 2001), p. 13-19.

The Company's Motion belatedly identified documents which have been in its possession since August 2001. The Company did not identify those documents for the parties until August 20, 2002, well over two months after the Company received four information requests that asked for the supporting documentation. See AG-FGE 5-11 and 5-12 (gas) and 7-11 and 7-12 (electric). By

⁷ The Company claims it cannot produce the material because of copyright. That argument is unpersuasive and not dispositive where, as here: 1) the material is an essential component of the Company's testimony (that the 2000-2002 Reports confirm the reasonableness of the test year amount); 2) the material is highly relevant regarding what expense level should be recovered; and 3) review of voluminous documents at Company offices without any copying does not satisfy the requirement that relevant information be produced. UNE Order, pp. 13-19.

referencing new information this late in the course of the Department's investigation, the Company has effectively deprived the Attorney General of his right to cross examine Mr. Collin on his testimony and to gain access to all relevant information in a timely and efficient manner. 220 CMR § 1.06(6)(c)(2).

The Company thus has prevented the parties from a thorough examination of the methodology used and conclusions reached by the Company in supporting its proposed payroll O&M increase. By law, the Department should not allow the Company to withhold this material because it would deny parties before this administrative agency "reasonable opportunity to prepare and present evidence and argument." G.L. c. 30A, § 11(1).

The Company seeks to create a new discovery standard for documents, one which unfairly restricts opposing parties and the Department from effectively reviewing, analyzing, and cross examining the Company's witness on his testimony and information which the Company cites in support of its proposed expense recovery. If the Company were to prevail on its Motion, neither the Department nor any reviewing entity would be able to verify whether the Company was reasonable in relying on the 2000-2002 Reports for benchmarking purposes, or whether there have been changes in methodologies over the years which render the Company's comparison inapposite.⁸

IV. Conclusion

For these reasons, the Department should deny the Company's Motion to restrict access

⁸ See, e.g., the 2001 Hay Compensation Report Planning Guide - General Industry Management section and the August 24, 2001 enclosure letter from Mr. John Yurkutat of Hay Group to Kimberlee Rummler of Unitil ("market charts using new methodology").

to the 2000-2002 Reports and strike all references to the 2000-2002 from the record.

Very truly yours,

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Dated: September 6, 2002